

GENERAL
OF COPYRIGHTS

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Before The
COPYRIGHT ARBITRATION ROYALTY PANEL
Washington, D.C.

_____)
In the Matter of)
1990, 1991 and 1992 Cable)
Royalty Distribution) Docket No. 94-3 CARP-90CD
Proceeding)
_____)

BRIEF OF THE
JOINT SPORTS CLAIMANTS
CONCERNING LEGAL STANDARDS

The Joint Sports Claimants submit this brief in response to the request for comments on (1) the power of the Copyright Arbitration Royalty Panel ("Panel"); (2) the significance of the question posed by the CRT in the 1989 proceeding: "Should the Tribunal continue the basis upon which it has made its distribution, or should it adopt a new basis?" (57 Fed. Reg. at 15288); and (3) the nature of the rationale that the Panel must provide in its final decision. See 1990-92 Tr. 1121-24 (December 11, 1995).

I. The Power of Copyright Arbitration
Royalty Panels

In the Copyright Royalty Tribunal Reform Act of 1993 ("1993 Act"), Congress abolished the CRT and transferred the CRT's responsibilities to copyright arbitration royalty panels. The purpose of the 1993 Act

was "to make only those procedural changes necessary to substitute arbitration panels for the Tribunal, and not to make any substantive changes in the compulsory licenses themselves." H. Rep. No. 103-286 at 12, 103 Cong., 1st Sess, reprinted in 4 U.S. Code Cong. & Admin. News 2953, 2959 (1993). See also 59 Fed. Reg. 2550, 2551 (January 18, 1994) (recognizing "the desirability of preserving as much continuity as possible between the old and new systems").

The legislative history of the 1993 Act reflects a specific concern with "ensuring greater continuity in decisionmaking." 140 Cong. Rec. E. 1962 (Aug. 3, 1993) (floor statement of Congressman Hughes, Chairman of the House Subcommittee on Copyrights and co-sponsor of the 1993 Act). In response to this concern (which was shared by copyright owners), the 1993 Act added a new Section 802(c) to the Copyright Act of 1976 ("1976 Act").

Section 802(c) subjects the Panel to the Administrative Procedures Act ("APA"); former Section 803(a) of the 1976 Act had imposed the same requirement on the CRT. Section 802(c) also directs the Panel to

"act on the basis of a fully documented written record, prior decisions of the Copyright Royalty Tribunal, prior copyright arbitration royalty panel determinations, and rulings by the Librarian of Congress under section 801(c)."

The discussion below considers the effect of the Section 802(c) directives on the Panel's authority to allocate the 1990-92 cable royalty funds.

A. Record Basis for Panel Decisions

1. The Statutory Directive

As noted above, Section 802(c) requires the Panel to "act on the basis of a fully documented written record" The legislative history of the 1993 Act does not contain any discussion of the meaning of this requirement. The reference to "on the record" decisionmaking should be read in conjunction with related provisions of the 1993 Act and the law that governed CRT actions. See also 5 U.S.C. §§ 554 & 557 (specifying APA requirements for "on the record" adjudications).

First, Section 802(c) authorizes copyright owners to submit "relevant information and proposals" to the Panel. As this suggests, the affected parties are afforded the opportunity to create the record before the Panel.

Second, Section 802(e) provides that the Panel's final decision is subject to review by the Librarian "after full examination of the record created in the arbitration proceeding . . . ;" that decision may be set

aside only if it is "arbitrary." Likewise, Section 802(f) provides that the U.S. Court of Appeals for the D.C. Circuit has jurisdiction to modify or vacate the Librarian's decision "only if it finds, on the basis of the record before the Librarian, that the Librarian acted in an arbitrary manner." Sections 802(e) and (f) underscore the importance of the Panel's deciding the case on the record that is subject to review.

Third, the 1976 Act did not contain a direct counterpart to the "record" requirement of Section 802(c). However, former Section 810 of the 1976 Act authorized judicial review of the CRT's decisions, in accordance with the APA, "on the basis of the record before the Tribunal." The court of appeals interpreted former Section 810 as requiring that the CRT's decisions be supported by "substantial evidence." The court noted that even under the "arbitrary and capricious" standard of review, judicial responsibilities

" 'include ascertaining the facts on which the Tribunal relied in making its decision, determining whether those facts have some basis in the record, and judging whether a reasonable decisionmaker could respond to those facts as the Tribunal did.' "

NAB v. CRT (I), 675 F.2d 367, 375 (D.C.Cir. 1982),
quoting RIAA v. CRT, 662 F.2d 1, 8 (D.C.Cir. 1981).

2. The Effect of the Statutory Directive

JSC believe that the Section 802(c) record requirement affects the Panel's authority in at least two ways. First, the Panel may believe that certain types of evidence or approaches would provide a better basis for allocating royalties than the evidence or approaches actually submitted by the parties. But the Panel must base its decision on the record actually before it; the decision must find support in that record.

JSC (and perhaps other claimants as well) would welcome the Panel's views on other methods (both procedural and substantive) that might be employed in future proceedings. Those views may provide the necessary catalyst for avoiding future litigation -- a goal that was achieved in only seven of the twelve Phase I proceedings conducted by the CRT.

Each of the parties, however, has structured its case in this proceeding (as well as made significant business decisions) to take account of the history that has been painstakingly developed over the past fifteen years of CRT proceedings. The claimants have sought to create a record that is responsive to issues raised and conclusions reached throughout that tortuous past. It is, therefore, particularly important that the Panel

base its decision on the record actually before it, as required by Section 802(c).

Second, the record before the Panel will necessarily contain differences from the records that were before the CRT in past proceedings. Section 802(c) vests the Panel with the authority (as well as the responsibility) to evaluate these differences and to determine their significance in fashioning royalty allocations. See, e.g., CBN v. CRT, 720 F.2d 1295, 1305 (D.C.Cir. 1983) (noting that CRT's decision to reduce the MPAA award from its olympian 1978 level reflected reasoned decisionmaking in light of the "different evidentiary records in the Tribunal's 1978 and 1979 proceedings").

To be sure, the mere fact that the records are different does not mean that the Panel may or should reach different conclusions. In the 1980 case, for example, the record contained studies and other evidentiary materials that were different from those in the 1979 record; parties improved the quality of their presentations; and there were changed circumstances from 1979. However, the CRT reaffirmed its 1979 awards and its decision to do so was affirmed by the court of appeals. See NAB v. CRT (II), 772 F.2d 922, 934-36 (D.C.Cir. 1985) (rejecting claims by certain parties

that differences in the evidentiary records mandated increased awards to them).

The court in NAB v. CRT (II) nevertheless made clear that it was permissible for the CRT to consider whether there had been "changed circumstances" from one year to the next in determining whether to change awards. 772 F.2d at 932 ("[I]t is entirely appropriate for the Tribunal to employ, as one of its analytical factors, the determination whether circumstances have changed in the course of the ensuing twelve months, inasmuch as that conclusion will obviously be relevant to the question whether an award should differ from the prior year's award"). Similarly, the court in NAB v. CRT (II) observed that:

"[I]f a claimant presents evidence tending to show that past conclusions were incorrect, the Tribunal should either conclude, after evaluation, that the new evidence is unpersuasive or, if the evidence is persuasive and stands un rebutted, adjust the award in accordance with that evidence."

772 F.2d at 932.

The Section 802(c) "record" reference requires the Panel to consider the differences between the present record and those before the CRT. It must evaluate those differences in light of the standards set forth in past judicial decisions. And it must determine whether (as in the 1979 case noted above) the

differences warrant adjustments in the awards or whether (as in the 1980 case noted above) they do not warrant such adjustments. As discussed below, those determinations must also take account of past CRT decisions.

B. The Role of Precedent

1. The Statutory Directive

Section 802(c) requires the Panel to "act on the basis" of "prior decisions of the Copyright Royalty Tribunal, prior copyright arbitration royalty panel determinations, and rulings by the Librarian under section 801(c)." Section 801(c) authorizes the Librarian, "before a copyright arbitration royalty panel is convened," to make "any necessary procedural or evidentiary rulings that would apply to the proceedings conducted by such panel."

The legislative history of the 1993 Act does not explain what Congress meant by the reference to acting "on the basis" of prior CRT, Panel and Librarian rulings. During legislative consideration of the 1993 Act, copyright owners advised congressional staff that the language was ambiguous and should be clarified. However, no change was made.

Rep. Hughes did observe in a floor statement that the purpose of the precedent requirement was to "ensure

greater continuity in decisionmaking." 140 Cong. Rec. E. 1962 (Aug. 3, 1993). It is uncertain whether Congress intended to impose upon the Panel the law that traditionally has been applied to administrative agencies (which may depart from precedent only under certain circumstances) -- or whether Congress, concerned about "greater continuity in decisionmaking," had a different standard in mind.

Congress chose to use the "on the basis" language to refer without distinction to prior CRT decisions, Panel determinations and Librarian rulings. Read literally, therefore, Section 802(c) would appear to require that prior CRT decisions be accorded the same weight as Librarian rulings under Section 801(c). Likewise, future arbitration panels will be required to accord the same weight to the Panel's determination in this proceeding that the Panel accords prior CRT decisions.

The Copyright Office has interpreted the Section 802(c) reference to prior CRT decisions. It made a "preliminary finding" that Section 802(c) does not "bind" the Panel to past CRT decisions. 59 Fed. Reg. 2550, 2551 (Jan. 18, 1994). Copyright owners expressed concern that this finding contravened Section 802(c). In response, the Copyright Office clarified that its finding applies only to rulings made in cases which were

pending at the time the 1993 Act became effective. 59 Fed. Reg. 23964, 23965 (May 9, 1994). The Copyright Office went on to conclude that Section 802(c) requires the Panel to give "precedential effect" to CRT rulings in any proceeding that was final when the 1993 Act became effective. Id.

There is no direct counterpart in the 1976 Act to the Section 802(c) reference to past CRT decisions. The CRT was reversed where the court of appeals concluded that the CRT had responded to similar factual situations differently. See, e.g., CBN v. CRT, 720 F.2d 1295, 1309-14 (D.C.Cir. 1983). However, the court of appeals appeared to take a "hard look" at such departures only where no award whatsoever was made to a claimant group. NAB v. CRT (II), 772 F.2d 922, 927-30 (D.C. Cir. 1985).

2. The Effect of the Statutory Directive

As the foregoing suggests, it is difficult (at this stage) to discern the precise limits that the Section 802(c) precedent requirement imposes upon the Panel. The nature of those limits depends, in significant part, upon the nature of the "precedent" at issue. There are no bright-line rules.

JSC do believe that Section 802(c) precludes the Panel from abandoning the CRT's marketplace standard for distribution. A brief discussion of why this is the

case illustrates the nature of the factors that should be considered in evaluating the Panel's responsibility under Section 802(c) to deal with past CRT precedent.

First, the marketplace standard has been a longstanding precedent; it was adopted in the very first CRT proceeding conducted more than fifteen years ago. In that proceeding, the claimants presented various (and generally conflicting) theories as to how the cable royalty fund should be allocated. After a lengthy hearing and briefing, the CRT resolved those conflicts, stating:

"Our review of the Act and legislative history indicates nothing that remotely suggests the purpose or effect of compulsory licensing should be to deprive affected copyright owners of the relative copyright payment which they would have received in a free marketplace."

45 Fed. Reg. 63026, 63037 (1980).

The CRT "decided that it was not the legislative intent of the Act to alter market valuation and return." Id. at 63036. The CRT "concluded that the allocation must take primary account of market factors in an effort to simulate market valuation." Id. The CRT thus adopted market factors (benefit, harm and marketplace value) as its primary distributional criteria. See also id. at 63037 (according time-related considerations "secondary" weight because an allocation based upon time

"would ignore market considerations and produce a distorted value of programming").

Second, the CRT consistently reaffirmed that royalty allocations should be based upon the marketplace standard. See, e.g., 1989 Final Determination, 57 Fed. Reg. 15286, 15288 ("As we stated [in the 1983 determination], the Tribunal's goal in allocating the fund among various program types is to simulate market valuation. . . . It assigns relative values among program types"); 1983 Final Determination, 51 Fed. Reg. 12792, 12793 ("The tribunal's goal, as it has stated in the 1978 proceeding, is 'to simulate market valuation.'").

Third, the courts of appeals consistently expressed approval of the CRT's reliance upon the marketplace standard. In NAB v. CRT (II), the court noted that the "Tribunal should rely, as it has in the past, on marketplace criteria" 772 F.2d at 939. Likewise, in CBN v. CRT, the court rejected MPAA's challenge to the CRT's reliance upon JSC's cable operator survey, stating:

"[G]iven Congress' evident intent to have the Tribunal operate as a substitute for direct negotiations (which were thought to be impractical) among cable operators and copyright owners, see House Report at 89, we find the Tribunal's receptiveness to evidence simulating the commercial attitudes of the 'buyers' in this

supplanted marketplace to be more than reasonable."

720 F.2d at 1306.

Fourth, the marketplace standard is consistent with the legislative purposes of Section 111. Congress determined that it would be "impractical and unduly burdensome to require every cable system to negotiate with every copyright owner" whose work was retransmitted on a distant signal basis. H. Rep. No. 94-1476, 94th Cong., 2d Sess. 89 (1976). Consequently, Congress afforded cable systems a compulsory license to retransmit the copyrighted programming on distant signals.

At the same time, Congress required cable systems to pay royalties for that programming. The decision to do so was based upon two express considerations: (a) carriage of distant signal programming is "of direct benefit to the cable system by enhancing its ability to attract subscribers and increase revenues" (id.) and (b) retransmission of a program "in an area beyond which it has been licensed . . . adversely affects the ability of the copyright owner to exploit the work in the distant market" (id. at 90). Like the CRT's primary factor of marketplace value, the "notions of 'harm' to copyright owners and 'benefit' to cable operators also 'involve a marketplace-type inquiry.'" NAB v. CRT (I), 675 F.2d at

374 n.4, quoting Tribunal Brief at 25 n.17.

Finally, the marketplace standard has not been controverted by the parties. Indeed, MPAA President Jack Valenti explained in his written testimony in this proceeding, "the Panel's mandate under Section 111 [is] to replicate the free marketplace." 1990-92 Valenti Testimony at 4.

Given the above considerations, JSC do not believe that the Panel has the authority to reject the CRT's marketplace standard for allocating royalties. Even if it did have such authority, the Panel should continue the historic approach of attempting to match each Phase I claimant's royalty share with the share that the claimant would have received in free marketplace negotiations with cable operators. The parties have relied upon the continuation of this precedent in fashioning their evidentiary presentations in this proceeding.

II. The CRT's 1989 Question

In the 1989 proceeding, the CRT identified as one of the questions it considered "[s]hould the Tribunal continue the basis upon which it has made its distributions, or should it adopt a new basis?" 57 Fed. Reg. at 15288. The Panel has requested the parties' views concerning the meaning of this comment.

JSC believe that the CRT was not rethinking whether it should continue to attempt to simulate market allocations. Indeed, there is no discussion in the 1989 determination of basing allocations on anything but estimates of marketplace allocations. Rather, the CRT's question went to the nature of the evidence upon which it should rely in attempting to simulate market allocations.

In prior years, the CRT had placed substantial reliance on the MPAA/Nielsen viewing studies and substantially less weight upon constant sum surveys of cable operators. In the 1989 case, the CRT considered whether it "should continue to base its allocation of cable royalties on the Nielsen study of distant signal viewing" or whether it should be "based on the Bortz survey of the importance cable operators give to various program categories." 57 Fed. Reg. at 15288. The CRT characterized this issue as "the heart of the 1989 case." Id. Essentially the same issue is now before the Panel.

The CRT also addressed a second question in the 1989 case -- whether to consider "quality" in deciding allocations. Although "quality" had been adopted as a secondary distributional factor in the 1978 proceeding, its precise role in fashioning royalty allocations (like the factor itself) had always been far from clear. See

also NAB v. CRT (II), 772 F.2d at 939 (warning CRT against the improper use of "quality" considerations). Finding that "quality" was inherently subjective and that basing awards on "quality" raised substantial First Amendment concerns, the CRT properly concluded that "in this proceeding and in future proceedings, quality will no longer be a criterion in the Tribunal's distribution." 57 Fed. Reg. at 15303.

III. Rationale of Panel Decisions

The Panel also has requested the parties' views on the nature of the rationale the Panel must provide in support of its ultimate royalty allocations. As the Panel has observed, prior distribution determinations generally contained lengthy summaries of the parties' evidentiary submissions, with more "concise" explanations of how particular percentage awards were determined.

Section 802(c) provides only that the Panel's decision must "set forth the facts that the arbitration panel found relevant to its determination." The legislative history accompanying the 1993 Act notes that a "clear report setting forth the panel's reasoning and findings will greatly assist the Librarian of Congress." H.R. Rep. No. 103-286, 103d Cong., 1st Sess. 13 (1993).

The quality of the CRT's opinions did improve over the years. Those opinions increasingly provided the parties with more information at least as to the nature of the CRT's concerns with particular pieces of evidence. That information has been helpful in permitting the parties to make improved evidentiary presentations.

But even the 1989 final determination fell short of what should be the objective of the Panel's final decision in this proceeding -- explaining as precisely as possible the considerations which support a conclusion that, in a free marketplace, a claimant would have received the particular royalty share that the Panel awards that claimant. Given the amount at stake in this proceeding as well as the precedential value of the Panel's decision for future proceedings, such an explanation is critically important.

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